No. 14833

United States Court of Appeals

For the Ninth Circuit

KENNETH GLEN MADSEN, *Appellant,*

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

I. FACTS IN APPELLANT'S BRIEF ARE TRUE

The United States Court of Appeals for the Ninth Circuit, Rule 18-3, concerning the appellees' brief, provides:

> "His brief shall be of like character with that required of the appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the appellant is controverted."

Appellees have waived "controversion of appellant's statement of the case" (Appellees' brief, page 3). Therefore, appellant's statement of the case, as it appears on pages 3 through 10 of his opening brief, should be accepted as telling the full, accurate and complete story of his unlawful commitment, and of appellant's futile attempts to obtain judicial relief therefrom.

II. PETITION WAS CONSIDERED ON MERITS

Appellees contend that the District Court for the Western District of Washington never ruled on the merits of appellant's amended petition. The District Court's order, which forms the basis of this appeal, reads *inter alia* as follows:

> "Passing the question of whether petitioner's 'Motion to Reconsider and Amended Petition for a Writ of Habeas Corpus' is properly before the court, inasmuch as petitioner has indicated he will seek relief from a higher court if he is denied a hearing on his petition, it appears advisable to consider said motion and amended petition on its merits."

The District Court then, in the next two paragraphs, said:

> "Paragraph I of the amended petition incorporates by reference the original petition."
>
> "Paragraph II alleges the sufficiency of the original petition."

From this we can properly assume that the District Court did consider the merits of the amended petition. These words mean just what they say. In other words, that the District Court did consider the merits. With nothing more than the printed opinion, what light gives appellees the insight to determine or claim that the District Court, in fact, did not consider the merits in arriving at its decision? The fact that the District Court considered the merits is not open to question, unless we completely disregard the Court's own words.

III. APPELLANT IS CONFINED IN OKLAHOMA

Appellant was secretly and in violation of a rule of this Court (Rule 27, *infra*) transferred from within the territorial jurisdiction of the District Court for the Western District of Washington. He was not allowed to contact his counsel before his departure, and his counsel were not otherwise advised of his departure. On May 15, 1955, appellant wrote the following letter to his attorneys:

> "May 15, 1955
>
> "Dear Mr. Simmons,
>
> "I am now in the County Jail in Portland. Early yesterday morning the Marshall came to Mt. Vernon and hurried me down here. I asked him if you had been notified of my being moved and he said it was against regulations to notify anyone when a prisoner is being moved. I am supposed to leave here tomorrow en route to El Reno.
>
> "I would appreciate it if you would send a letter to El Reno telling me just what the score is because I'm kinda mixed up about things cause everything happened so fast I didn't have anytime to prepare myself for it. Hoping to get straightened out soon.
>
> "Sincerely yours,
>
> /s/ KENNETH MADSEN"

This letter, dated May 15, 1955, was postmarked at Portland May 18, 1955, and received May 19, 1955, by appellant's attorneys, in Seattle.

Appellant is now in custody in the Federal Reformatory at El Reno, Oklahoma. He therefore is presently confined outside the territorial jurisdiction of the District Court for the Western District of Washington.

At the time appellant filed his amended petition, however (May 10, 1955), he was within the territorial jurisdiction of the District Court (R. 92-95). The order of the District Court for the Western District of Washington, Northern Division, which forms the basis of this appeal, was rendered on May 25, 1955, and was filed the following day (R. 99). This was eleven days after appellant's removal from within the territorial jurisdiction. The District Court was fully apprised, in open court, on May 20, 1955, five days before rendition of its order, that the appellant was no longer within its territorial jurisdiction.

IV. APPELLEES HAVE MADE GENERAL APPEARANCE

Appellees urge upon this Court that it has no jurisdiction over any person capable of enforcing any order it might render in this cause. But that is not the fact. This Court not only has jurisdiction over the person of an individual to give force and effect to its orders in this case, but it also has the inherent power, absent that, to order appellant returned to Washington, in order to give effect to its mandates.

In appellees' brief, page 17, we find the statement that Herbert Brownell "exercises (through the Bureau of Prisons) some control over appellant." In the transcript of record, pages 23 and 24, we find:

> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Twenty-five (25) Years."

It is obvious that Herbert Brownell not only has con-

trol over appellant's place of confinement, but also personally or through his agent also actual custody. Appellant's imprisonment is invalid if he is not held under and pursuant to the judgment and commitment of the Alaska Court, which specifically commits him to the "custody of the Attorney General or his authorized representative."

On examination of the records in this Court we find, *inter alia,* the following, which conclusively shows appellees have made a general appearance:

1. Stipulation, dated November 18, 1955, approving appellant's motion, signed by Edward J. McCormick, Jr., "of counsel for appellees . . . "

2. Order, entered on or about November 21, 1955, "approved for entry" by Edward J. McCormick, Jr.

3. Stipulation, dated December 1, 1955, approving appellant's motion, signed by Edward J. McCormick, Jr., "of counsel for appellees . . . "

4. Order, entered on or about December 2, 1955, "approved for entry" by Edward J. McCormick, Jr.

5. Request that appeal be heard in Seattle or Portland, which is signed under "copy received" by Edward J. McCormick, Jr., "assistant United States Attorney and one of the attorneys of record of appellees."

6. Acknowledgment of service, signed by Edward J. McCormick, Jr., Assistant United States Attorney, which reads:

> "I, the undersigned, Edward J. McCormick, Jr., one of the attorneys of record for the above named appellees, do hereby acknowledge that on the 8th day of December, 1955, I was duly and regularly

served with three copies of the appellant's opening brief in the above cause."

7. Motion, Stipulation and Affidavit of Appellees' attorneys for continuance. In the stipulation, under date of January 4, 1956, we find:

> "It is hereby stipulated and agreed by and between Edward J. McCormick, Jr., Assistant United States Attorney, of counsel for appellees and . . . "

In the affidavit of Edward J. McCormick, Jr., attached thereto, under date of January 3, 1956, we find:

> "That he is one of the appellees' attorneys; that he is familiar with the problems and issues raised by this appeal; that he has been diligently working on appellees' brief herein, and finds that in order to properly prepare and present what he considers a good and complete brief, he will need additional time of at least one week for preparation; that the appellant is now serving a twenty-five-year sentence, the validity of which may stand or fall on the contents of the brief; that it is not possible, even by continual study, to adequately prepare, print and serve a good brief on behalf of appellees by January 7, 1956.
>
> /s/ Edward J. McCormick, Jr."

8. Order, entered on or about January 4, 1956, and presented by Edward J. McCormick, Jr., as "Assistant United States Attorney of Attorneys for Appellees."

9. Stipulation to facts prepared by appellees' counsel, Edward J. McCormick, Jr., under date of January 3, 1956, reading, *inter alia,* that:

> "It is hereby stipulated and agreed by and be-

> tween counsel for appellant and counsel for appellees in the above-entitled cause, the following facts are true: . . . "

This stipulation is signed by Edward J. McCormick, Jr., "Assistant United States Attorney of Counsel for Appellees."

10. Brief, of appellees, prepared and submitted by Charles P. Moriarity, United States Attorney, and Edward J. McCormick, Jr., Assistant United States Attorney.

In the rules of the United States Court of Appeals for the Ninth Circuit under Rules 18-9, we find, *inter alia,* that:

> "A brief of an *amicus curiae* may be filed only after order of the court or when accompanied by written consent of all parties to the case."

From the record we readily discern that no special appearance has been made herein, nor was appellees' brief filed as a mere *amicus curiae* brief. It is clear that the Attorney General has made a general appearance in this case and that this Court has jurisdiction over his person. Appellees have made no special appearance, on the contrary, they have acted completely under a general appearance throughout (*Cf., Standish v. Gold Creek Mining Co.* (9 Cir., 1937) 92 F.2d 662; 6 C.J.S. Appearance p. 47, §17a; 3 Am. Jur. Appearances p. 783, §3 and p. 794, §20).

V. THE CASE IS NOT MOOT

Appellees' general appearance prevents this case from being moot. In *Ex Parte Mitsuye Endo* (1944) 323 U.S. 309, 65 S.Ct. 208, 220, the Supreme Court said:

"The fact that no respondent was ever served with process or appeared in the proceedings is not important.

"The statute upon which the jurisdiction of the District Court in habeas corpus proceedings rests . . . gives it power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.' That objective may be in no way impaired by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun."

In *Orloff v. Willoughy,* 72 S.Ct. 998 (1952), Judge Douglas declared that the problem presented was protection of jurisdiction:

" . . . the Commanding Officer of Fort Lawton can recall and produce Orloff [petitioner] in response to an order of the District Court for the Western District of Washington . . . no matter to what army post Orloff is assigned . . . In view of the control over Orloff which the Commanding Officer of Fort Lawton has by reason of Orloff's 'detached service status,' the jurisdiction of this Court over the appellate proceedings would not be disturbed if Orloff were moved to another army post within the United States."

However, even absent the appellees' general appearance, this Court has full jurisdiction. In *Ex Parte Catanzaro* (3 Cir., 1943) 138 F.2d 100 (Certiorari denied 64 S.Ct. 789), the court, after recognizing the proposition that it would not decide a moot point, said

there was nothing in the record to indicate that petitioner had been removed from the jurisdiction, but presumably, even if there had been, the court said:

> "Furthermore, we do not believe that passing about the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can defeat the jurisdiction of the Court to grant or refuse the writ on the merits of the application. It is a general rule of law that where one has become subject to the jurisdiction of a court, the jurisdiction continues in all proceedings arising out of the litigation such as appeals and writs of error. . . . [Court then points out Court Rule that custody shall not be disturbed pending appeal] . . . The only way the Marshal could explain an inability to produce the petitioner in response to the writ, if issued, would be set up a violation of the rule of this Court, which might serve as a confession, but hardly an avoidance. We think it clear that whatever may be the rights the petitioner has through his application for a writ of habeas corpus, they are not lost by whatever may have been done to him between his application and the decision of his case on appeal."

In the rules of the United States Court of Appeals for the Ninth Circuit, Rule 27, we find:

> "Pending an appeal from the final decision of any Court or Judge declining to grant a Writ of Habeas Corpus, the custody of the prisoner shall not be disturbed."

In *U. S. v. Neeley* (U.S.D.Ct. N.D. Illinois E.D., 1953) 115 F.Supp. 615, Judge Campbell held:

> "Upon the basis of these findings, the court concludes as a matter of law that jurisdiction over re-

lator's person was acquired on September 14, 1953, at 12:05 P.M. At that time, counsel for relator filed the petition for the writ; at that time, relator was detained by agents of the respondent within this district; and at that time, respondent knew that this proceeding would be instituted. These are the facts which compel the court to find that jurisdiction was acquired.

"The court is pleased that the Department of Justice chose to obey the writ issued on September 14, by producing relator before the court, for voluntary obedience has obviated the need to call upon the inherent power of this court to compel obedience to its lawful process. But if the Department chose not to obey the writ, this proceeding would not have been invalidated. Jurisdiction in this matter, once acquired, is retained, *Ex Parte Mitsuye Endo,* 1944, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243; and the court could have passed upon the merits of this case in the absence of the relator. See, for example, *Ex Parte Catanzaro,* 3 Cir., 1943, 138 F. 2d 100, 101, wherein the court stated: ' * * * we do not believe that passing about of the body of a prisoner from one custodian to another after a writ of habeas corpus has been applied for can defeat the jurisdiction of the court to grant or refuse the writ on the merits of the application.' An able opinion by Judge Holtzoff expresses a similar view. *Ex parte Flick,* D.C., 1948, 76 F.Supp. 979."

In *U. S. v. Sahli* (7 Cir., 1954) 216 F.2d 33, the court said, in affirming the *Neeley* case:

"On this appeal the relator states that the United States District Court for the Northern District of Illinois had jurisdiction to issue the writ of habeas corpus on September 14, 1953, and the

> United States Attorney agrees that the jurisdiction of that court is not in question. Of course, the parties cannot bestow jurisdiction by agreement . . . (citation) . . . but we also agree that the court, under the facts of this case, had jurisdiction. At the time the petition for habeas corpus was filed the relator was still in the territorial jurisdiction of the United States District Court for the Northern District of Illinois. His subsequent removal by the respondent to Indiana did not rob the Illinois court of jurisdiction."

This Court has inherent power to order appellant returned to the State of Washington (*Cf., Reed v. United States* (9 Cir., 1950) 181 F.2d 14).

The United States Supreme Court in the *Hayman* case (*United States v. Hayman* (1951) 342 U.S. 205, 72 S.Ct. 263), directly decided that a District Court was not without power to compel the return of a prisoner for a hearing under 28 U.S.C.A. §2255. We have heretofore seen that the proceedings under §2255 are, in effect, Habeas Corpus in the sentencing court. In fact, if Congress had granted, in so many words, Habeas Corpus jurisdiction to sentencing courts and had withheld that jurisdiction from District Courts having territorial jurisdiction over the prisoner, except when the collateral attack in the sentencing court was inadequate or ineffective we would probably have had a lot less initial confusion over the effects of §2255.

The *Hayman* case cites the Habeas Corpus case of *Price v. Johnston* (1948) 334 U.S. 266, 68 S.Ct. 1049, as authority for the proposition that a prisoner may be ordered returned to the jurisdiction. It is true that the *Hayman* case involved a proceeding under §2255, but

§2255 confers no greater power upon the sentencing court than 28 U.S.C.A. §2241, *et seq.,* confers upon the court with territorial jurisdiction. This plus the fact that courts have inherent power and also statutory power to issue orders ancillary to Habeas Corpus proceedings gives this Court of Appeals full jurisdiction in the case at bar to dispose of the case as justice and law require. Appellant contends that the reasoning of the *Hayman* case, by analogy, is applicable, since §2255 confers upon the sentencing court the same authority for granting relief as previously might have been obtained through Habeas Corpus in a court having territorial jurisdiction. In the *Hayman* case the Supreme Court said:

> "Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondents' filing of a motion under that Section.
>
> "The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law." (Also see note 38 in the *Hayman* case)

Appellant is not obliged to again seek relief in Alaska, because of the death of Judge Folta. All of appellant's allegations and pleadings were formed and pre-

sented to court prior to Judge Folta's death. In fact, the Washington District Court rendered its final order prior to Judge Folta's death and had been informed that appellant would seek relief from a higher court if he was denied a hearing (R. 96). Appellant is not now obligated to return to the Alaska Court. In *Ekeberg v. McGee* (9 Cir., 1951) 191 F.2d 625, the appellee's argument was similar and analogous to the appellees' argument in the instant case. This Court said:

> "The appellee also contends that appellant has not exhausted his state remedies because under the California law a decision on a petition for the writ of habeas is not *res judicata*. Hence, the argument is, he has still an 'available process' in a second petition for the writ setting forth the same grounds as in a prior writ.
>
> "Assuming but not deciding that such is the California law, we do not so construe the provisions of §2254, for to do so would require the absurdity that a prisoner convicted under the California law never could have the benefit of that section. That section is satisfied where the applicant for the writ has once availed himself of his state remedies."

If this Court of Appeals holds that it does not have jurisdiction it will literally write Habeas Corpus off the books. Under such a holding there would be nothing to prevent the constant removal of a prisoner from within the territorial jurisdiction the moment he files a petition, thereby preventing forever his gaining a hearing to determine the question of whether or not he was being unlawfully detained. Under such a holding, the rules of Court would be rendered meaningless.

Under such a holding appellant might be subjected to

the same fruitless §2255 efforts time and time again. Appellant respectfully submits that this Court should meet this case head-on and decide the same according to the law and justice which we as Americans hold dear. In this case, the chips are down and liberty is at stake. We must wholly depend upon constitutional guarantees. There is no other recourse.

Respectfully submitted,

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